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Nos. 91-543, 91-558 and 91-563

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In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF ALLEGANY, NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF CORTLAND, NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Tenth Amendment and related constitutional principles of federalism bar Congress from requiring New York to provide for the disposal of low-level radioactive waste generated within its borders.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 942 F.2d 114. The opinion of the district court (Pet. App. 18a-26a) is reported at 757 F. Supp. 10.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1991. The petitions for a writ of certiorari were filed on September 30, 1991 (No. 91-543) and October 3, 1991 (Nos. 91-558 and 91-563), and were granted on January 10, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b-2021j, are set out in the Appendix to the brief for petitioner New York State. N.Y. Br. 1a-30a.

STATEMENT

1. This case arises out of the continuing problem of disposing of commercial low-level radioactive waste (LLRW). LLRW originates in hospitals, nuclear power plants, research institutions, and private industry and comes in various forms, including radioactively contaminated protective gear, filters, glassware, and power-plant hardware.[2] After three of the Nation's commercial dis-

[1] "Pet. App." refers to the appendix to the petition in No. 91-543.

[2] LLRW was defined in Section 2(2) of the Low-Level Radioactive Waste Policy Act of 1980 (1980 Act), Pub. L. No. 96-573, 94 Stat. 3347, as "radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954 [42 U.S.C. 2014(2)]." The 1980 Act did not govern the disposal of LLRW "generated as a result of defense activities of the Secretary [of Energy] or Federal research and development activities," which was to be disposed of at federally owned facilities. 1980 Act § 4(a)(1)(A), 94 Stat. 3348.

posal facilities closed between 1975 and 1979 (including a disposal facility at the Western New York Nuclear Service Center in West Valley, New York), the Nation was left with only three commercial facilities, one each in Nevada, South Carolina, and Washington.[3] In 1979, Nevada and Washington, in the aftermath of a series of packaging and transportation incidents, ordered temporary shutdowns at the facilities within their borders.[4] Faced with the prospect of becoming the sole disposal facility for the Nation's LLRW, South Carolina ordered a 50% reduction in LLRW accepted by the facility within its borders.[5] Finally, confronted with growing public opposition to continued acceptance of LLRW from other States, all three sited States announced plans to implement permanent shutdowns. J.A. 109a, 142a, 147a. As testimony before Congress made clear, such a shutdown would have had a dramatic impact on the public welfare, possibly causing interruption of vital medical services.[6]

[3] See H.R. Rep. No. 1382, 96th Cong., 2d Sess., Pt. 2, at 25 (1980); 126 Cong. Rec. 20,136 (1980) (remarks of Sen. Thurmond).

[4] H.R. Rep. No. 314, 99th Cong., 1st Sess., Pt. 2, at 17-18 (1985) [hereinafter H.R. Rep. No. 99-314]; J.A. 109a. In addition to the temporary ban on all disposal, Washington, through initiative legislation approved in a statewide referendum, passed an initiative to prohibit importing LLRW from other States, but the Ninth Circuit held the law invalid as an impermissible restriction on interstate commerce. *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 630-632 (1982), cert. denied, 461 U.S. 913 (1983); see also *Illinois* v. *General Elec. Co.*, 683 F.2d 206, 213-215 (7th Cir. 1982) (striking down Illinois law forbidding import of spent nuclear fuel for storage); cf. *Hunt* v. *Chemical Waste Management, Inc.*, 584 So. 2d 1367 (Ala. 1991) (upholding state law intended to discourage imports of hazardous waste from other States), cert. granted, No. 91-471 (Jan. 27, 1992).

[5] See H.R. Rep. No. 99-314, note 4, *supra*, Pt. 2, at 17-18.

[6] See, *e.g.*, *Low-Level Nuclear Waste Burial Grounds: Hearing Before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology*, 96th Cong., 1st Sess. 30-38 (1979) (testimony of Lawrence Muroff, M.D., American College of

Although Congress initially considered constructing LLRW disposal facilities on federal land,[7] pressure from the States led it to abandon this approach in favor of a state-oriented solution. A task force headed by seven Governors, working under the auspices of the National Governors' Association (NGA), proposed a "state solution" to the LLRW disposal problem, which the NGA then presented to Congress with the unanimous support of its members.[8] The NGA recommended that Congress

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Nuclear Physicians) [hereinafter *Burial Grounds Hearing*]; *id.* at 57-60 (statement and testimony of NRC Chairman Joseph Hendrie); see also U.S. General Accounting Office, *The Problem of Disposing of Nuclear Low-Level Waste: Where Do We Go From Here?* 1, 12 (1980) (describing potential effect of shutdown on medical services and illegal dumping).

[7] See H.R. 3298, 96th Cong., 1st Sess. §§ 203(a)(2) and (3), 206(c) and (d)(2) (1979) (bill introduced by Rep. Jeffords proposing construction of federal facilities for all radioactive waste, with limited provisions for Governors to influence federal site selection), *reprinted in To Amend the Atomic Energy Act of 1954: Hearings Before the Subcomm. on Energy and the Envt. of the House Comm. on Interior and Insular Affairs*, 96th Cong., 2d Sess. 530, 539-540, 548-551 (1985) [hereinafter *AEA Hearing*]; H.R. 5819, 96th Cong., 1st Sess. § 4(a) (1979) (bill introduced by Rep. McCormack proposing to direct the DOE, within six months, "to establish, operate, and maintain at least nine but no more than fourteen low-level radioactive waste repositories located at appropriate sites in the continental United States"), *reprinted in AEA Hearing*, *supra*, at 583; *Burial Grounds Hearing*, note 6, *supra*, at 2 (remarks of Rep. McCormack); *id.* at 66 (statement of DOE Deputy Under Secretary Worth Bateman).

[8] See National Governors' Ass'n, *Low-Level Waste: A Program for Action* (Nov. 1980) (Final Report of the NGA Task Force) (excerpts *reprinted at* J.A. 105a-141a) [hereinafter *1980 NGA Report*]; Holmes Brown, NGA Center for Policy Research, *Low-Level Waste Handbook* iii (1986) ("The National Governors' Association unanimously adopted the [1980] report."). Two other organizations of state government officials, the National Conference of State Legislatures and the President's State Planning Council on Radioactive Waste Management, submitted similar recommendations. See H.R. Rep. No. 99-314, note 4, *supra*, Pt. 2, at 18; 126 Cong. Rec.

enact legislation assigning to each State primary responsibility for ensuring the availability of adequate disposal capacity for LLRW generated within its borders. It suggested that States be allowed to meet this responsibility either individually (by providing for development of disposal facilities within their own borders), or cooperatively, by joining regional compacts that would provide disposal capacity for LLRW generated within member States. *1980 NGA Report*, note 8, *supra*, at 5-10, *reprinted in* J.A. 113a-119a. To encourage States to respond to the problem, the NGA recommended that Congress permit compacts with disposal facilities to discriminate against LLRW generated outside the compact. See *1980 NGA Report*, note 8, *supra*, at 72-73. Finally, although the NGA believed that the prospect of exclusion from existing facilities would be sufficient to induce States to act, see *id.* at 8, *reprinted in* J.A. 117, the NGA stated that "stronger federal action may be necessary" if the "states have not responded effectively" within a two-year period. See *id.* at 8-9, *reprinted in* J.A. 117a-118a.

The Low-Level Radioactive Waste Policy Act of 1980 (1980 Act) incorporated the States' principal recommendations.[9] Congress declared a federal policy of holding each State "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," and found that LLRW could be managed "most safely and efficiently * * * on a regional basis." Pub. L. No. 96-573, § 4(a)(1), 94 Stat. 3348. The 1980 Act therefore invited States to enter into regional compacts that, if ratified by Congress, would have the au-

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20,135 (1980) (remarks of Sen. Thurmond). We have lodged a copy of the *1980 NGA Report* with the Court.

[9] See *The Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste: Hearing Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 3 (1983) ("The National Governors Association endorsed adoption of [the 1980 Act].") (statement of Idaho Gov. John Evans representing the NGA).

thority, beginning in 1986, to restrict the use of their disposal facilities "to the disposal of low-level radioactive waste generated within the region." § 4(a)(2)(B), 94 Stat. 3348. Through this approach, Congress sought to avert the collapse of the Nation's LLRW-disposal system by providing for a five-year transition from the existing system, with its unwise dependence on unwanted shipments into the three States with disposal facilities, to a system of regional markets predicated on voluntary access agreements among the States. In keeping with the NGA's recommendations, Congress for the time being rejected more onerous alternatives [10] and chose not to provide direct penalties for States that failed to participate in this transition.[11] Instead, Congress relied on the States' interests in securing an outlet for LLRW generated within their borders to provide the impetus for them to act.

2. a. By 1985, it was clear that the 1980 Act's objectives would not be met. Although seven proposed compacts had been submitted to Congress for ratification, only three (the compacts that had been formed around the original three sited States) had operational disposal facilities. Approval of the three sited compacts would have left LLRW generators in 31 States without an assured outlet for their wastes. J.A. 143a. Congress found itself unable to ratify the pending compacts with-

[10] For example, under one early proposal, title to LLRW would have passed to the State in which it had been generated upon transfer from the generator to a licensed transporter for shipment to a disposal facility. See H.R. 5809, 96th Cong., 1st Sess. § 2(a) (1979), *reprinted in AEA Hearing*, note 7, *supra*, at 578; *Burial Grounds Hearing*, note 6, *supra*, at 6 (statement of Rep. Derrick). Another early proposal called for the denial of all applications for licenses or permits to generate LLRW in a State that failed to "assure the safe storage and disposal of all [LLRW] generated in that State." H.R. 6212, 96th Cong., 1st Sess. § 1 (1979), *reprinted in AEA Hearing*, note 7, *supra*, at 592-593.

[11] See 126 Cong. Rec. 20,137 (1980) (statement of Sen. Thurmond).

out "triggering a national emergency with grave implications for the public's health and safety." [12] To the sited States, this decision not to ratify meant an indefinite continuation of the existing inequitable distribution of LLRW disposal burdens. Accordingly, the Governors of Nevada, South Carolina, and Washington threatened to shut off or severely limit access to the Nation's only three disposal facilities because, in the words of Washington Governor Booth Gardner, "the people of Washington, South Carolina and Nevada [were] simply unwilling to have their states continue to serve as the dumping grounds for all other states' nuclear garbage." [13]

In light of this imminent crisis, Congress once again heard testimony as to the serious implications of the

[12] H.R. Rep. No. 99-314, note 4, *supra*, Pt. 2, at 18; see *Low-Level Waste Legislation: Hearings on H.R. 862, H.R. 1046, H.R. 1083, and H.R. 1267 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 1-2 (1985) (statement of Comm. Chairman Udall) [hereinafter *Legislation Hearing*]; 131 Cong. Rec. 38,404 (1985) (remarks of Sen. Hart); *id.* at 38,407 (remarks of Sen. Thurmond); *id.* at 38,421 (remarks of Sen. Mitchell).

The likelihood that Congress would decline to ratify pending compacts under these circumstances was not lost on the unsited States. One state official acknowledged in a 1985 Senate hearing that the State had slowed the development of its facility when "it became known that the date was expected to be extended." *Low-Level Radioactive Waste: Hearings on H.R. 862, H.R. 1046, H.R. 1083, H.R. 1267, H.R. 2062, H.R. 2635, and H.R. 2702 Before the Subcomm. on Energy Conserv. and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 229-230 (1985) (statement of Thomas Blackburn, Texas Low-Level Radioactive Waste Disposal Authority) [hereinafter *Waste Hearing*].

[13] *Low-Level Radioactive Waste Disposal: Joint Hearing on S. 1571 and S. 1578 Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 250 (1985) [hereinafter *Disposal Hearing*]; see H.R. Rep. No. 99-314, note 4, *supra*, Pt. 2, at 18-19; S. Rep. No. 199, 99th Cong., 1st Sess. 3-4 (1985) [hereinafter S. Rep. No. 99-199]; *Waste Hearing*, note 12, *supra*, at 150, 161-162 (testimony of South Carolina Gov. Richard Riley).

sited States' plans for the public health and welfare.[14] Convinced that "even a temporary shutdown of the waste disposal operations would have extremely serious consequences, including the closing of numerous facilities that are vital to the maintaining of essential public service," [15] Congress revisited the 1980 Act to strengthen incentives for the creation of new disposal capacity.

b. Representatives of sited and unsited States reconvened, under the auspices of the NGA and other organizations, to develop a legislative proposal for defusing

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[14] *E.g.*, *Legislation Hearing*, note 12, *supra*, at 123 ("failure to develop additional sites and/or any disruption in the availability of existing disposal capacity will have a serious and negative impact on the delivery of health care services and the cost of these services in this country") (testimony of Robert E. Henkin, M.D., American College of Nuclear Physicians); *Disposal Hearing*, note 13, *supra*, at 356-357 (describing possible effects of disposal facility shutdown on performance of radiological procedures and production of radiopharmaceuticals) (testimony of Stanley Goldsmith, M.D., Society of Nuclear Medicine); see also U.S. General Accounting Office, *Regional Low-Level Radioactive Waste Disposal Sites—Progress Being Made But New Sites Will Probably Not Be Ready by 1986*, at 8 (1983) ("Without a place to dispose of their radioactive waste, nuclear powerplants, hospitals, research institutions, and all kinds of industrial users or manufacturers may have to cease, or curtail severely, activities which use radioactive materials and which generate low-level radioactive waste.").

[15] S. Rep. No. 99-199, note 13, *supra*, at 3-4; see also 131 Cong. Rec. 38,404 (1985) (hospitals and laboratories 'normally have little ability to store their waste, and are thus tremendously dependent upon continued access to the three existing sites") (statement of Sen. Hart); *id.* at 38,409 ("Legislation is clearly needed for the purpose of preventing a nationwide crisis in low-level radioactive waste disposal.") (remarks of Sen. Bradley); *id.* at 38,417 ("If the three States choose to refuse wastes, many institutions such as research facilities, hospitals and universities will be in a difficult situation.") (remarks of Sen. Symms); *id.* at 38,423 ("[W]ithout the extension of the deadline for low-level nuclear waste this country will have unregulated nuclear waste at several unsanctioned sites across this country. Congress must not allow this situation to continue.") (remarks of Sen. Dixon).

the renewed disposal crisis without sacrificing the States' authority over the siting and operation of LLRW disposal facilities. These consultations played a key role in the formulation of H.R. 1083, 99th Cong., 1st Sess. (1985), which provided the framework for the 1985 Act.[16] This bill, according to its lead sponsor Representative Udall, was "primarily a resolution of the conflicts between the States that do not have disposal capacity and the three States that have capacity." 131 Cong. Rec. 35,203 (1985). New York firmly supported this effort to reinvigorate the state-oriented solution that had been adopted in 1980. Testifying before Congress, a Deputy Commissioner of New York's Energy Office acknowledged that New York was "highly likely to be a host State" due to its size and LLRW output, but nevertheless supported congressional efforts to resolve the conflict, including the creation of "specific and easily identifiable milestones," and suggested that Congress consider imposing "[a]ppropriate penalties * * * for failure to meet these milestones." [17] Similarly, Senator Moynihan of New York

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[16] See H.R. Rep. No. 99-314, note 4, *supra*, Pt. 1, at 14 (proposal developed under auspices of the NGA "served as a foundation for H.R. 1083"); 131 Cong. Rec. 35,204 (1985) ("H.R. 1083 represents the diligent negotiating undertaken by that group. The fundamentals of their settlement are embodied in the bill we are bringing to the floor today.") (remarks of Rep. Udall); J.A. 144a, 148a-149a (Affidavits of Washington Gov. Booth Gardner and South Carolina Gov. Carroll Campbell); *Waste Hearing*, note 12, *supra*, at 161-162 (testimony of South Carolina Gov. Richard Riley).

[17] *Legislation Hearing*, note 12, *supra*, at 98, 198 (testimony of Charles Guinn, Deputy Commissioner for Policy and Planning, New York State Energy Office); see *Low-Level Radioactive Waste Regional Compacts: Hearings on H.R. 1012, 3002, and 3777 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 266 (1983) (expressing New York's support for allowing sited compacts to exclude out-of-compact LLRW provided that "interim access to existing facilities will be made available" to generators in noncomplying states) (testimony of Eugene Gleason, Director of Policy Planning, New York State Energy Office).

urged his colleagues to enact the legislation in its final form.[18]

c. The resulting legislation, the Low-Level Radioactive Waste Policy Amendments Act of 1985, Title I of Pub. L. No. 99-240, 99 Stat. 1842 [hereinafter 1985 Act], reflects this carefully negotiated compromise between sited and non-sited States.[19] The benefits to non-sited States

[18] Senator Moynihan stated:

> I am pleased to report that this complex bill meets [the] conflicting needs [of the sited and non-sited States] very well. New Yorkers will continue to light some of their lights with nuclear electricity—and their doctors will continue to use life-saving laboratory tests that depend on the use of radioactive materials. So will the citizens of South Carolina—and they will be able to watch New York, and the rest of the Nation, make their own arrangements to dispose of their own low-level radioactive wastes.

131 Cong. Rec. 38,423 (1985).

[19] Pursuant to Title II of the same statute, the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, 99 Stat. 1859 [hereinafter Omnibus Compact Act], Congress approved 7 regional compacts (including three compacts centered on the already sited States), encompassing 41 States. Because of subsequent compact legislation and reshufflings among the States, there now are 9 approved compacts, with a total of 42 member States. See Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act, Pub. L. No. 100-712, 102 Stat. 4773 (1988); Appalachian States Low-Level Radioactive Waste Compact Consent Act, Pub. L. No. 100-319, 102 Stat. 471 (1988). This figure excludes Michigan, whose continuing status as a member of the Midwest compact is somewhat uncertain, for the reasons explained in its brief in this case. See Amicus Curiae Michigan Br. 5-7. In any event, Michigan will not be a member after July 23, 1992.

The remaining nine States (including Puerto Rico and the District of Columbia, which are treated as States under the 1985 Act, 42 U.S.C. 2021b(14)) have remained unaffiliated. Five of these—Maine, Massachusetts, New York, Texas, and Vermont—have announced plans for the development of LLRW disposal facilities within their borders. See Office of Environmental Restoration and Waste Management, U.S. Dep't of Energy, *Report to Congress in Response to Public Law 99-240: 1990 Annual Report on Low-Level Radioactive Waste Management Progress* 27-39 (1991) (annual report required by 42 U.S.C. 2021g(b)) [hereinafter *1990 DOE Report*]. The other four unaffiliated States either do not export LLRW (Puerto Rico) or export limited volumes under contract with a sited regional compact (the District of Columbia, New Hampshire, and Rhode Island). *Id.* at 41-43, 45-46. We have lodged a copy of the *1990 DOE Report* with the Court.

such as New York were clear and immediate: those States retained access to existing disposal sites for an additional seven years, running through 1992. 42 U.S.C. 2021e. The benefits to sited States were also substantial, largely consisting of three types of incentives to encourage non-sited States to respond to the problem.[20]

First. The 1985 Act affords States that enter compacts the opportunity to restrict access to disposal facilities located within their compact region. During a seven-year interim period (running through 1992), States that host a disposal facility located in a compact region can levy stiff surcharges against LLRW generated outside their compacts,[21] and, under certain limited circumstances,

[20] The 1985 Act also improved the 1980 Act by clarifying the definition of LLRW. As discussed in note 2, *supra*, the 1980 Act defined LLRW negatively, as any radioactive waste outside of certain specific categories. One of these categories—transuranic waste—changed with every change in the regulatory definition of transuranic waste. See *Legislation Hearing*, note 12, *supra*, at 312. 42 U.S.C. 2021c(a)(1)(A) resolves this problem by providing specifically that States are responsible only for class A, B, or C radioactive waste, as defined by the 1983 version of NRC's regulations, 47 Fed. Reg. 57,473-57,474, codified at 10 C.F.R. 61.55 (1983). Moreover, Section 2021c(a)(1)(B) provides that the States are not responsible for LLRW falling within the definition in Section 2021c (a)(1)(A) if it is produced by the Department of Energy, the United States Navy as a result of decommissioning vessels, or any facility involved in atomic weapons research or production.

[21] See 42 U.S.C. 2021e(d)(1) (permitting surcharges on extra-regional LLRW at the rate of $10 per cubic foot during 1986 and 1987, increasing to $40 per cubic foot during 1990, 1991, and 1992); Section 2021e(e)(2)(A)(i), (B)(i) and (D) (permitting penalty surcharges, ranging from two to four times ordinary surcharge levels, for LLRW that originates in States that fail to comply with certain milestones set forth in Section 2021e(e)(1)).

can exclude such out-of-compact LLRW altogether.[22] Moreover, beginning in 1993, approved regional compacts will have complete freedom—limited only by the terms of their compacts—to impose price discrimination and access restrictions on LLRW generated outside of the compact region.[23]

Second. The 1985 Act also seeks to encourage development of new disposal capacity through federal payments to States and regional compacts that meet the statutory milestones for siting, licensing, and completing disposal facilities.[24] Payments are made from an escrow account, managed by the Secretary of Energy, 42 U.S.C. 2021e(d)(2)(A), that contains one-fourth of the disposal

[22] During the interim access period, Section 2021e(e)(2)(A)(ii), (B)(ii) and (C) permits the existing facilities to exclude LLRW that originates in States that fail to comply with certain milestones set forth in Section 2021e(e)(1). Furthermore, Section 2021e(b) permits the existing facilities to limit disposal to amounts of LLRW specified in the Act.

[23] See 42 U.S.C. 2021d(c) (congressional approval as prerequisite to imposition of access restrictions by compacts). For an existing compact permitting such restrictions, see, *e.g.*, Northwest Interstate Compact, Arts. IV(2), V, 99 Stat. 1862-1863.

[24] The 1985 Act calls for incentive payments (1) if a State meets the 1986 deadline to join a compact or indicate its intent to develop a site of its own, Section 2021e(d)(2)(B)(i) and (e)(1)(A); (2) if a State meets the 1988 deadline to develop a siting plan, Section 2021e(d)(2)(B)(ii) and (e)(1)(B); (3) if a State meets the 1990 deadline to file an application with the NRC or certifies that it will be able to provide for its LLRW after 1992, Section 2021e(d)(2)(B)(iii) and (e)(1)(C); or (4) if a State is able to provide for disposal of all of its LLRW by 1993, Section 2021e(d)(2)(B)(iv). Under Section 2021e(e)(1)(F), a State also can qualify for incentive payments by entering into an agreement with a compact commission for a sited compact that provides for disposal of all LLRW generated within that State.

The States and compacts may use these incentive payments to finance the creation, management, regulation, and closure of LLRW disposal facilities, or to mitigate the effects of hosting a disposal facility. Section 2021e(d)(2)(E)(i).

surcharges paid by generators during the seven-year interim access period. Incentive payments to an unsited State or compact are proportionate to the surcharges that generators have paid to dispose of LLRW generated within that State or compact. New York, like most of the unsited States and compacts, met the first three incentive payment milestones and collected its incentive payments for doing so.[25]

Third. The final set of incentives is in the form of penalties, not rewards. These penalties are the costs to generators that result from discrimination by regional compacts against LLRW generated outside their regions. Initially, these costs—in the form of the surcharges discussed *supra*, at note 21—fall solely on LLRW generators. The final penalty for the States' failure to act, however, falls more directly on the States themselves:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator

[25] All six unsited compacts (counting the dissolved Western Compact and the newly formed Southwestern Compact as one) and four of the nine unaffiliated States (including New York) met the first three statutory milestones. *1990 DOE Report*, note 19, *supra*, at 65-66. Moreover, New York informed the court of appeals that it was "currently in full compliance with the 1985 Act" and recounted without qualification its 1989 certification to Congress that the State would "be able to store, manage, or dispose of its LLRW after January 1, 1993." N.Y. C.A. Br. 10 & n.8. Similarly, in January 1991, New York formally assured the sited States that its wastes would not become an involuntary burden on them. See *1990 DOE Report*, note 19, *supra*, at 69.

or owner notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(C).[26] This so-called "take-title" provision originated with the Senate Committee on Environment and Public Works. See S. 1578, 99th Cong., 1st Sess. (1985); 131 Cong. Rec. 38,414 (1985) (remarks of Sen. Johnston).[27] It was viewed as imposing on unsited States a liability risk (albeit one that every State could prevent from materializing),[28] in return for important benefits, "chief of which is the right [as a member of an approved compact] to exclude low-level radioactive waste not generated in the compact region from any disposal facility located within the region." 131 Cong. Rec. 38,415 (1985) (remarks of Sen. Johnston).[29]

3. When Congress enacted the 1980 Act, New York's non-federal LLRW generators, including the state government as one of the State's major generators in its own right,[30] had been entirely dependent on the disposal facilities in Nevada, South Carolina, and Washington for five years.[31] In response to the Act, New York entered

[26] The 1985 Act also includes a January 1, 1993, milestone (three years before the January 1, 1996, deadline) for States to provide for the disposal of all LLRW generated within their borders. 42 U.S.C. 2021e(d)(2)(C). States that miss the 1993 milestone, however, need not take title to LLRW generated within their borders; Section 2021e(d)(2)(C)(ii) allows them to avoid the take-title sanction until 1996 simply by forfeiting to the generators the incentive payments specified in Section 2021e(d)(2)(B)(iv), see note 24, *supra*.

[27] The take-title provision was incorporated in a package of amendments to H.R. 1083, which was approved by the Senate, 131 Cong. Rec. at 38,425, adopted by the House with certain modifications, *id.* at 38,117-38,120, and reaffirmed by the Senate as modified, *id.* at 38,558. The notion of requiring States to take title initially was suggested in 1979, see note 10, *supra* (discussing proposal of Rep. Derrick), and raised again in the 1985 hearings, see *Waste Hearing*, note 12, *supra*, at 336, 351-352 (NRC testimony and prepared answers); *Disposal Hearing*, note 13, *supra*, at 574, 577 (NRC support for "language to vest title to the waste in such states no later than the close of 1992").

[28] The 1996 take-title deadline, just under 10 years from the effective date of the 1985 Act, offered States a time period one year longer than the NRC's most conservative estimate of the time required to site, construct, and license a disposal facility. *Waste Hearing*, note 12, *supra*, at 391-393 (testimony and statement of John Davis, Director, NRC's Office of Nuclear Materials Safety and Safeguards). There was no indication from unsited States or other interested parties that this deadline was too ambitious. See 131 Cong. Rec. 38,115 (1985) ("all States will have developed management ability by that time") (remarks of Rep. Udall); *id.* at 38,408 ("the milestones in the bill are considered to be achievable by all unsited States or compact regions") (remarks of Sen. Stafford).

[29] Amicus Curiae Council of State Governments suggests (Br. 27) that the take-title provision would support an injunction compelling a State to take physical possession. We disagree. The language of the take-title provision is plainly susceptible of a more natural reading, under which non-complying States and compacts may refuse possession, but become liable for damages if they do so. To our knowledge, the expansive interpretation posited by the Council has never been endorsed by any court or federal agency.

[30] In 1990, New York generators shipped approximately 71,000 cubic feet of LLRW to the Nation's three commercial LLRW disposal facilities, the fourth highest volume of any State and 6.2% of the national total. See New York State Energy Research and Development Auth., *New York State Low-Level Radioactive Waste Status Report for 1990* at 17 (1991) [hereinafter *1990 New York Report*]. State-owned generators accounted for a considerable proportion of this waste stream; its two nuclear power plants alone (the Fitzpatrick and Indian Point No. 3 plants) accounted for approximately 23% of the State's commercial LLRW by volume and 17% by total radioactivity. *Id.* at 20, 32-33. Like other commercial nuclear power plants, New York's installations have been assigned guaranteed, transferable allocations of disposal capacity at the three existing disposal facilities. See *1990 DOE Report*, note 19, *supra*, at A-9 (describing New York's guaranteed allocations under 42 U.S.C. 2021e(c)(1)-(4)). Small additional quantities of LLRW also were generated by state-operated medical and research institutions. See *1990 New York Report*, *supra*, at 5. A copy of the *1990 New York Report* has been lodged with the Court.

[31] An LLRW disposal facility, licensed and regulated by New York and operated by its lessee, the Nuclear Fuel Services Company, operated in West Valley, New York, from 1963 through 1975,

into compact negotiations with several other northeastern States, but soon withdrew in favor of a "go it alone" approach advocated by the State's Energy Office. See *Legislation Hearing*, note 12, *supra*, at 197 (testimony of Charles Guinn).

Thus, Governor Cuomo proposed state legislation designed to ensure "operation of a permanent [LLRW disposal] facility in New York State" by 1993. See *Legislation Hearing*, note 12, *supra*, at 197 (testimony of Charles Guinn). In 1986, the New York Legislature concluded that New York no longer could "assume that other states will continue indefinitely to provide access to facilities adequate for the permanent disposal of low-level radioactive waste generated in New York." 1986 N.Y. Laws, ch. 673, § 2. It therefore enacted legislation providing for the siting and financing of an LLRW facility in New York in order "to provide for continued operation of essential and beneficial medical, research, industrial, energy and other facilities in New York which use radioactive materials and generate [LLRW] and to

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when it was closed due to water management problems. See U.S. Dep't of Energy, *Western New York Nuclear Service Center Study: Companion Report*, 3-38 to 3-54 (1978). The Center also housed an NRC-licensed commercial nuclear fuel reprocessing center (the only one in the Nation), which was operated by the same lessee from 1966 through 1972, and an NRC-licensed disposal facility that accepted wastes produced by the fuel reprocessing operation from 1966 through 1982. See Oak Ridge Nat'l Laboratory, U.S. Dep't of Energy, *Integrated Data Base for 1991: U.S. Spent Fuel and Radioactive Waste Inventories, Projections, and Characteristics* 122 & note b (1991); U.S. Dep't of Energy, *Annual Report to Congress: West Valley Demonstration Project* 3, 12 (1991) (report required by Section 4 of the West Valley Demonstration Project Act, Pub. L. No. 96-368, 94 Stat. 1349 (1980)). The Center is presently the site of a federal-state demonstration project that is stabilizing and solidifying approximately 2 million liters of high-level liquid wastes left by New York's lessee. *Annual Report, supra*, at 3-7, 23 (describing the project's uses of $457 million in federal funding through fiscal year 1990).

protect the public health and safety." *Ibid.*[32] The statute reflects the State's choices to act independently rather than to join a regional compact, to develop a disposal facility rather than to contract with a sited compact, and to undertake this development directly, rather than through a contractor.[33] Funding for these efforts comes from two sources: assessments on nuclear power plants and federal payments received by New York for meeting the milestones set forth in the 1985 Act. See N.Y. Pub. Auth. Law § 1854-d(2) (McKinney Supp. 1992).[34]

In 1988, New York developed a list of five potential sites, two in Cortland County and three in Allegany

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[32] See also C.A. App. 117, 123, 136, 139, 142, 145, 148 (references to the threat of a loss of access for New York generators in recommendations favoring the State's 1986 legislation).

[33] See N.Y. Envtl. Conserv. Law §§ 29-0301 to 29-0305, 29-0501 to 29-0503 (McKinney Supp. 1992); N.Y. Pub. Auth. Law § 1854-c.3 (McKinney Supp. 1992). The current version of this legislation incorporates amendments contained in two 1990 statutes. The first amended provisions of the State's 1986 law that had called for title to LLRW to "vest in the State of New York upon acceptance of such waste by the authority at the permanent disposal facilities." 1986 N.Y. Laws, ch. 673, § 4 (formerly codified at N.Y. Pub. Auth. Law 1854-d(6)). The amended version provides that title will "at all times remain in the generator of such waste, including the period following acceptance" at the State's facilities. 1990 N.Y. Laws, ch. 368, § 1, codified at N.Y. Pub. Auth. Law § 1854-d(6) (McKinney Supp. 1992). The second set of amendments revised the State's siting process, altering the composition of the Siting Commission and Advisory Committee (renamed the "Citizens Advisory Committee"), and modifying these bodies' mandate to require selection of a disposal method before the siting process could recommence. See 1990 N.Y. Laws, ch. 913, codified at N.Y. Envtl. Conserv. Law §§ 29-0301 to 29-0505.

[34] All of these decisions are consistent with the State's long history of active involvement in the nuclear field, see C.A. App. 198 (1959 report advocating state involvement in nuclear power and assumption of regulatory authority under the agreement-states program, see note 51, *infra*), both as a promoter and regulator of nuclear industry, see Pet. App. 5a-6a, and a large-scale generator of LLRW, see note 30, *supra*.

County. Residents of the two counties have opposed consideration of these sites. J.A. 29a-30a, 42a, 66a-68a. These protests led to suspension of siting activities in April 1990, see *1990 DOE Report*, note 19, *supra*, at 33, and to enactment of state legislation amending the siting process later that year. See note 33, *supra*.[35]

4. Petitioners filed this suit in February 1990, seeking a declaratory judgment that the 1985 Act violates the Tenth and Eleventh Amendments, as well as the Guaranty Clause of Article IV.[36] The district court granted summary judgment in favor of the United States. Pet. App. 18a-26a. Rejecting the Tenth Amendment arguments, the district court found that the Act was not the product of any defect in the political process and that New York had not been singled out for especially harsh treatment. Pet. App. 21a-25a. In addition, the court summarily rejected petitioners' Eleventh Amendment argument, holding that the Eleventh Amendment operates as a restriction on judicial, not congressional, power. Pet. App. 25a (citing *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989)). Finally, the court dismissed petitioners' claims under the Guaranty Clause, finding them to be "inextricably intertwined" with their unmeritorious Tenth and Eleventh Amendment claims. *Ibid.*

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[35] Although the Town of Ashford recently expressed interest in hosting a disposal facility, the relevant resolution of its own board was struck down by a state trial court because it had not been preceded by an environmental study found to be necessary under state law. *Mayerat* v. *Town Board*, 575 N.Y.S. 2d 765, 769-773 (1991). The Town's resolution invited the New York Legislature to consider resuming LLRW disposal at the Western New York Nuclear Services Center, a state-owned installation located within the Town's boundaries. See note 31, *supra*. Current New York law specifically bars the State's LLRW Siting Commission from choosing the Center as an appropriate site for a disposal facility. N.Y. Envtl. Conserv. Law § 29-0303.7 (McKinney Supp. 1992).

[36] The States of Nevada, South Carolina, and Washington intervened as defendants to protect their interest in increased authority over the disposal facilities within their borders.

5. The court of appeals affirmed, sustaining the 1985 Act (including its take-title provision) against petitioners' various constitutional challenges. Pet. App. 1a-17a. The court found that the national legislative process had operated properly in producing the 1980 and 1985 Acts and that these Acts in fact "are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics." Pet. App. 13a. The court of appeals observed that the LLRW legislation furnished "identical treatment for all states," Pet. App. 15a, and thus preserved "equality in dignity and power among the several states." Pet. App. 15a (citation omitted). The court of appeals similarly rejected petitioners' arguments based on the Eleventh Amendment and the Guaranty Clause. It found that the Eleventh Amendment is not an independent limit on Congress's power to legislate under the Commerce Clause, and that Allegany County's Guaranty Clause argument is "analytically indistinct" from the Tenth Amendment arguments raised by the other petitioners. Pet. App. 16a-17a.

SUMMARY OF ARGUMENT

1. The bulk of the incentives contained in the 1985 Act are clearly constitutional because they do nothing more than condition New York's receipt of federal benefits on its compliance with milestones established in the 1985 Act. The incentive payments, which in substance offer States funds for LLRW disposal if they are proceeding satisfactorily to provide for disposal of LLRW, are permissible under the Spending Power. See *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). Similarly, the Commerce Clause permits Congress not only to issue affirmative regulations of interstate commerce, but to lift prohibitions that the dormant Commerce Clause otherwise would impose. See, *e.g.*, *Northeast Bancorp, Inc.* v. *Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985). Thus, the provisions authorizing compact regions

to exclude or discriminate against out-of-compact LLRW are permissible under the Commerce Clause.

2. Petitioners' only substantial constitutional challenge is to the take-title provision. But that provision will not even take effect until 1996; thus, petitioner's challenge in that respect is not yet ripe. This Court should not assess weighty constitutional questions in a vacuum of factual uncertainty. In any event, the provision is constitutional. Congress's decision to enact the statute, in response to similar proposals from the NGA, shows that this statute is a "parago[n] of legislative success," Pet. App. 13a, not the result of a failed process vulnerable to assault under *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

To the extent *Garcia* leaves open the possibility of a challenge to a federal statute that "commandeers" state processes—an issue identified in *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982)—we believe the Act withstands such a challenge. The Constitution permits the National Government to require States to take some actions in response to problems of interstate dimension. Here, that mandate is quite limited. The 1985 Act does not require the State to enact or enforce any federally mandated regulatory program, and thus does not intrude impermissibly on State sovereignty. To the contrary, like the statute upheld in *FERC*, the 1985 Act leaves the State a number of options. Although it obviously would be permissible for the State to enact an LLRW waste-disposal program, the 1985 Act scarcely forces that particular course upon the State. The State, for example, could choose to construct such a facility itself or, to take the simplest response, contract with a compact to ensure that New York's generators can dispose of their waste elsewhere. Thus, the 1985 Act requires in practical effect nothing more than that the State refrain from foisting its unwanted waste on the rest of the Union. In light of the origin of the problem as a dispute among the States, the requests of the States for a state-oriented solution

and the assiduous care Congress displayed in attending to the interests and concerns of the several States, the Act is a constitutionally permissible example of cooperative federalism designed to preserve, rather than preempt, state authority.

3. The take-title provision is severable from the remainder of the 1985 Act. Invalidation of the entire Act at this point—after New York has received the benefits of its bargain during several years of access to the existing facilities—would deprive the sited compact regions of their portion of the bargain: the ability to exclude out-of-compact waste at a date certain. Whatever Congress would have done if it had known that the take-title provision would be held unconstitutional, it is abundantly clear that it would have done something. The proper approach would be to leave the remaining portions of the 1985 Act in place.

ARGUMENT

I. THE BASIC PROVISIONS OF THE 1985 ACT, WHICH PROVIDE THAT STATES CAN RECEIVE THE FISCAL BENEFITS OF FEDERAL PROGRAMS AND PROTECT PRODUCERS IN THEIR BOUNDARIES FROM THE ADVERSE EFFECTS OF FEDERAL LAW ONLY BY COMPLIANCE WITH CONDITIONS ESTABLISHED BY CONGRESS, ARE PLAINLY PERMISSIBLE EXERCISES OF CONGRESS'S SPENDING AND COMMERCE POWERS

Petitioners contend that the 1985 Act should be declared unconstitutional because it oversteps substantive limits on congressional power. But their broad-based attack on the Act fails to acknowledge the commonplace form of most of the Act's provisions.[37] Except for the

[37] See N.Y. Br. 31 (attacking general statement of state responsibility, 42 U.S.C. 2021d(a)(1), together with take-title provision); Cortland Br. 10, 25 (complaining of "direct orders" pertaining to siting); Allegany Br. 24 (urging that entire Act be struck down without regard to differences in incentive mechanisms); see also

take-title provision (which we discuss in detail in Point II, *infra*), none of the provisions of the Act imposes affirmative obligations on the States. Rather, all of the other incentives set forth in the Act take the form of conditions on the continued receipt by the States (or their generators) of the benefits of federal law, or direct regulation of interstate commerce. Such incentives are plainly constitutional.

A. The Incentive Payments Established by 42 U.S.C. 2021e(d)(2)(B) Are Valid Under the Spending Power

First, subparagraphs (i) through (iv) of 42 U.S.C. 2021e(d)(2)(B) provide for incentive payments to States to encourage them to comply with four specified milestones set forth in the Act. Similarly, Section 2021e(d)(2)(E) limits the uses to which the States can put any such payments they may receive. These provisions fall comfortably within congressional authority, under the spending power,[38] "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota* v. *Dole*, 483 U.S. at 206 (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)).

The spending power is broad but "not unlimited," *South Dakota* v. *Dole*, 483 U.S. at 207; these payments, however, fall comfortably within the range of that power, as explained by this Court in *Dole*. First, the Act was passed as an attempt to resolve the crisis in disposal of LLRW

Amicus Curiae Connecticut Br. 10 n.4 (attacking penalty surcharge provision); Amicus Curiae Michigan Br. 10 ("mandates of the 1985 Act * * compel States to engage in the commerce of disposing of LLRW").

[38] Although Article I, Section 8, Clause 1 of the Constitution does not on its face refer to the power to "spend," this Court regularly has described that clause as including the "spending power." See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. at 206-207.

and thus prevent a shutdown of existing disposal facilities. This manifestly legitimate congressional goal establishes beyond question that Congress authorized the payments in pursuit of "the general Welfare," as described in Article I, Section 8, Clause 1. See *South Dakota* v. *Dole*, 483 U.S. at 207. Second, the provisions of Section 2021e(d)(2)(B) and (d)(2)(E) are clear and specific, so that the Act "enables the States to exercise their choice knowingly." *South Dakota* v. *Dole*, 483 U.S. at 207, quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the 1985 Act's conditions on incentive payments are related to the purposes of the federal program under which the payments are made (see *South Dakota* v. *Dole*, 483 U.S. at 207-208), because the payments arise out of the very statutory program with which the State must comply to receive the payments.

Not only is this exercise of the spending power clearly permissible, but the incentive payments transgress no "independent constitutional bar," whether imposed by the Tenth Amendment or otherwise. See *South Dakota* v. *Dole*, 483 U.S. at 210-211. A requirement that a State take an action on pain of losing federal funds does not run afoul of the Tenth Amendment because "the Federal Government does have power to fix the terms upon which its money allotments to states shall be disbursed. * * * [T]he State could * * * adopt the simple expedient of not yielding to what she urges is federal coercion." *Id.* at 210 (citations omitted). Finally, there is no suggestion that the relatively minor payments involved here are "so coercive as to pass the point at which 'pressure turns to compulsion.'" *Id.* at 211 (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).

B. The Commerce Clause Authorizes Congressional Action That Permits States To Take Action Discriminating Against Interstate Commerce

Various provisions of the 1985 Act also encourage non-sited States to respond to the crisis by allowing regions that have disposal capacity to discriminate against regions that do not. Thus, Section 2021e(d)(1) allows states that host compact-region facilities to impose surcharges on extra-regional waste, and Section 2021e(e)(2) allows these host states to charge penalty surcharges on waste generated in areas that fail to meet the milestones set forth in Section 2021e(e)(1). Most importantly, commencing in 1993, regional compacts with operational disposal facilities ~~compact-region facilities~~ will be free to exclude or discriminate against extra-regional waste in accordance with the terms of their compacts.

These provisions thus accomplish two things: (1) they reward sited compacts by authorizing them to discriminate against interstate commerce, and (2) they encourage States to comply with federal policy in order to shield their generators from the exercise of this discriminatory authority. Enactments such as these fall squarely within the constitutional grant of power "To regulate Commerce * * * among the several States." First, it is well established that the Commerce Power permits Congress not only to enact its own regulations of interstate commerce, but also to "redefine the distribution of power over interstate commerce by 'permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible.'" *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87-88 (1984) (quoting *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)); see, *e.g.*, *Northeast Bancorp, Inc.* v. *Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985). Second, the analysis is no different where the power is delegated not to individual States, but to compacts formed with congressional consent pursuant to the Compact Clause. Indeed, the congressional control inherent in the process of compact approval lessens the possibility of discrimination

that Congress did not intend to authorize. Cf. *Northeast Bancorp.* v. *Board of Governors*, 472 U.S. at 174-175 (rejecting, on grounds of prior congressional consent, Commerce Clause challenge to state statutes creating regional bias in bank ownership restrictions). Finally, for the reasons we have stated discussing the incentive payments, the permitted discrimination does not become unconstitutional simply because Congress allows the State an opportunity to mitigate the financial impact of the discrimination on its generators if the State chooses to act in accordance with federal policy; thus, the penalty surcharge provisions pass muster as well.

II. THIS COURT SHOULD NOT INVALIDATE THE TAKE-TITLE PROVISION, 42 U.S.C. 2021e(e)(2)(C)

Petitioners' most strenuous objections to the 1985 Act (see N.Y. Br. 23-26; Allegany Br. 4-5; Cortland Br. 27-28) are directed at the take-title provision (see 42 U.S.C. 2021e(d)(2)(C)), which provides that States that have not provided for disposal of LLRW generated within their borders by 1996 must, on request of the generator, take title to the LLRW and take possession of the LLRW or assume liability for the generator's involuntary retention of possession. This challenge, however, is not ripe for decision. The provision cannot become effective until 1996, and will have actual effect even then *only* if the other incentives contained in the 1985 Act fail to induce New York to deal with the problem. In any event, the provision passes constitutional muster.

A. Petitioners' Challenge to the Take-Title Provision Is Not Ripe

Although the United States did not argue below that the case as a whole is unripe (see U.S. Br. in Opp. 25), we remain convinced, as we argued in the court of appeals (see U.S. C.A. Br. 42), that petitioners' attack on the take-title provision is premature. The challenge to the take-title provision focuses on remote, highly con-

tingent eventualities. The take-title provision cannot take effect until January 1, 1996, and will have force at that time only if New York has failed, through any of the various options permitted by the 1985 Act, to provide for disposal of LLRW generated within its borders. Thus, because New York is not "immediately threatened with harm" by the take-title provision, *Poe* v. *Ullman*, 367 U.S. 497, 504 (1961) (opinion of Frankfurter, J.), and because it is not at all clear that New York ever will be harmed by the provision, a decision would contravene this Court's established proscription against "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

The minimal current effect of the take-title provision is evident in view of the remaining portions of the Act, which, for reasons we have discussed, are clearly constitutional. The other incentives created by the Act—placing conditions on the State's access to federally provided funds and allowing out-of-State facilities to discriminate against the State's generators—provide a powerful and independent inducement to the State to comply. Nothing beyond speculation can gauge the extent to which the take-title provision adds weight to these already strong incentives. Here, as in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 203 (1983), the fact that the State is not being "uniquely affected" by the provision in question should lead the Court to refrain from adjudicating the constitutionality of this particular provision, even though the Act as a whole is having a considerable current impact.

B. The Take-Title Provision Is Not the Result of a Failure of the National Legislative Process

If this Court considers the constitutionality of the take-title provision, its analysis should begin with the recognition, noted last Term in *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991), that this Court's decision in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), "has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers." 111 S. Ct. at 2403. Correspondingly, this Court's recent opinions have suggested that federal statutes enacted under the Commerce Clause may transgress constitutional constraints imposed by our federal structure in cases where the legislative process has failed to perform properly. See *Garcia*, 469 U.S. at 556 ("In the factual setting of these cases the internal safeguards of the political process have performed as intended."); *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988) ("*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment."). Assuming that this daunting standard could ever be met, see *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911), there can be no serious claim that the 1985 Act fails to withstand scrutiny in this respect.[39] As the court of appeals recognized, the 1980

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[39] In addition to the district court and court of appeals in this case, two other district courts have considered and rejected attacks of this nature on the 1985 Act. See *Concerned Citizens of Nebraska, et al.* v. *United States Nuclear Regulatory Comm'n*, No. CV90-L-70 (D. Neb. Oct. 19, 1990), slip op. 8-9, appeal docketed, No. 91-2784 (8th Cir. Aug. 12, 1991); *Michigan* v. *United States*, 773 F. Supp. 997, 1001-1003 (W.D. Mich. 1991), appeal docketed, No. 91-2281 (6th Cir. Nov. 19, 1991) (appeal held in abeyance by order dated Jan. 17, 1992). Similar attacks on other federal statutes have been rejected without exception. See, *e.g.*, *Nevada* v. *Watkins*, 914 F.2d 1545, 1556-1557 (9th Cir. 1990) (statute identifying Yucca Mountain site in Nevada as sole focus of additional study for high-level radioactive waste repository); *Nevada* v. *Skinner*, 884 F.2d 445, 452 (9th Cir. 1989) (statute linking federal highway funds to state enforcement of 55-mile-per-hour speed limit), cert. denied, 493 U.S. 1070 (1990); *International Ass'n of Fire Fighters, Local 2203* v. *West Adams County Fire Protection Dist.*, 877 F.2d 814, 820-821 (10th Cir. 1989) (requirement under the Fair Labor Standards Act that local government pay firefighters extra for overtime);

and 1985 Acts "are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics." Pet. App. 13a.

The central features of the 1985 Act—state responsibility to provide for disposal coupled with newly created state authority (exercised through membership in an approved interstate compact) to restrict interstate commerce in LLRW for disposal—originated with the States themselves. Indeed, those two features came to Congress in 1980 with the States' unanimous endorsement. States supported this approach in 1980 in order to resolve the dispute between sited and unsited States, and to avert an interruption of vital activities that produce LLRW, in a manner that would enhance state authority over the siting and operation of LLRW disposal facilities. So too, the 1985 Act was enacted with active state participation. The basic changes effected by the 1985 Act—a lengthy extension of access to the three existing sites coupled with strengthened incentives to minimize the odds of another crisis in 1996—again were recommended by the States themselves. Indeed, those changes were intended to salvage the state-oriented approach after the 1980 Act failed to produce the anticipated response from the unsited States.[40]

Nevada v. *Burford*, 708 F. Supp. 289, 300-301 (D. Nev. 1989) (separate challenge to statute designating Yucca Mountain, Nevada, for investigation as high-level waste disposal site), aff'd, 918 F.2d 854 (9th Cir. 1990), cert. denied, 111 S. Ct. 2052 (1991).

[40] Petitioner Cortland County finds the 1985 Act unconstitutional under its "Process Failure Test," because, in its view, the 1985 Act imposed burdens on the State alone, rather than private citizens, and thus "severed the interests of the states from those of private LLRW generators." Cortland Br. 25. To the contrary, the 1985 Act sharply increased costs for private generators. Generators, not States, pay surcharges and penalty surcharges on shipments of LLRW from States and compacts without disposal facilities. 42 U.S.C. 2021e(b) and (d)(1)-(2). Moreover, the exclusionary authority exercised by approved compacts is likely to increase disposal costs, which must be paid by generators, not States. Thus, the Act in fact burdens the interests of generators at least as substantially as it burdens those of the States.

Moreover, it especially ill behooves New York to claim that it was "deprived of any right to participate in the national political process," or left "politically isolated and powerless" by the Act, see *Baker*, 485 U.S. at 513. New York officials testified before Congress that the Empire State supported congressional efforts to provide for an extended period of assured nationwide access to the three existing disposal facilities, subject to "reasonable surcharges," and to set forth "specific and easily identifiable milestones," which could be linked to "appropriate penalties." See *Legislation Hearing*, note 12, *supra*, at 197-199. Moreover, the State concedes that its "congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts." 91-543 Pet. 7. Indeed, Senator Moynihan spoke strongly in favor of the final bill —including the take-title provision—on the floor of the Senate just before the Senate passed the bill. See 131 Cong. Rec. 38,423 (1985) (quoted in note 18, *supra*). Far from failing New York, the national political process afforded the State ample opportunity to participate, as well as an outcome that generally conformed to its own contemporaneous recommendations.

C. The Take-Title Provision Survives Independent Constitutional Constraints Designed To Preserve the Federal Structure

1. *The Take-Title Provision Does Not Impermissibly Commandeer the States' Processes*

Petitioners argue strenuously (N.Y. Br. 15-34; Allegany Br. 10-19; Cortland Br. 9-19) that the take-title provision is unconstitutional because it "commandeers the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program," *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*,

452 U.S. 264, 288 (1981). Although this Court has not determined whether this type of "commandeering" challenge survived *Garcia*, see *South Carolina* v. *Baker*, 485 U.S. at 513 (declining to decide whether "commandeering" claims are viable after *Garcia*), we agree with petitioners' submission to the extent that it suggests that grave constitutional questions could be raised by a congressional enactment that required a State to enact and enforce a federally prescribed regulatory program. On the other hand, this Court's decisions establish that the Constitution does permit some types of federal directives addressed directly to the States, especially in areas of intense federal interest. In light of the circumstances giving rise to the legislation at issue, including the grave crisis in interstate disposal of LLRW, the serious dispute among the States out of which the crisis arose, the States' persistent requests for a state-oriented solution, and the alternate ways in which the State can comply with the take-title provision, we believe that the limited requirement imposed by the provision—which does not "commandeer" state officials for enforcement of a federal program—is permitted by the Constitution.

a. The Constitution Permits Some Affirmative Federal Directives to the States.—Affirmative federal directives addressed specifically to the States do not, in all circumstances, upset the constitutional balance between federal and state sovereignty. For example, Congress's power to compel state judges to hear actions brought under federal law is well established. See *Testa* v. *Katt*, 330 U.S. 386, 392-394 (1947); accord *FERC* v. *Mississippi*, 456 U.S. 742, 760-763 (1982); *Palmore* v. *United States*, 411 U.S. 389, 402 (1973). Moreover, although commands to state judges generally may threaten state sovereignty less than commands addressed to state executive officials and legislatures, see *FERC*, 456 U.S. at 762; *id.* at 784-785 (O'Connor, J., dissenting), it is clear that "there are instances where the Court has upheld federal statutory structures that in effect directed state [executive branch officials] to take * * * certain actions." *FERC*, 456 U.S. at 762. The most obvious examples are statutes implementing the Extradition Clause and the Civil War Amendments, which have been held to create valid obligations on state governments.[41]

This Court itself has taken similar action in cases that called for resolution of conflicts regarding the allocation of shared resources among the several States. For example, in *Colorado* v. *New Mexico*, 459 U.S. 176 (1982), the Court observed that its prior decisions in this area had "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." *Id.* at 185 (citing *Wyoming* v. *Colorado*, 259 U.S. 419 (1922)); see *Wyoming* v. *Colorado*, 309 U.S. 572, 581 (1940) (threatening Colorado with contempt if its officials failed to meet their obligations "to keep her total diversions from the Laramie River and its tributaries within the limit fixed by the decree").[42] Similarly, the Court has endorsed the creation of federal rules to govern conflicts among the States that arise, like this one, out of efforts of complaining States to prevent States in which waste is generated from allowing waste to be exported beyond their borders. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 106-108 (1972), noting, in the context of water pollution, that federal courts can require States to take affirmative ac-

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[41] See *Puerto Rico* v. *Branstad*, 483 U.S. 219, 227-228 (1987) (state officials can be required to turn over fugitives under extradition legislation implementing the Extradition Clause) (overruling *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861)); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 319-320, 334-335 (1966) (state officials can be required to obtain federal clearance before implementing changes in state voting law under legislation authorized by the Fifteenth Amendment).

[42] See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) (upholding a judicial command to state officials "to prepare a set of rules that will implement the Court's interpretation of the rights of the parties" to a dispute over Indian fishing rights under a federal treaty).

tions to remove conditions that constitute a nuisance to other States); *Missouri* v. *Illinois*, 200 U.S. 496, 520-521 (1906) (a downstream State can seek relief in the Supreme Court to force removal of a nuisance created by an upstream State). See generally *Arkansas* v. *Oklahoma*, No. 90-1262 (Feb. 26, 1992), slip op. 5-6.

If this Court has power to devise federal resolutions to such interstate disputes, then surely Congress—the branch of the national government in which the States are the most directly represented—can do the same under the Commerce Clause.[43] See *Arizona* v. *California*, 373 U.S. 546, 556, 565-566 (1963) (noting Congress's power to allocate water among the several States); *Illinois* v. *Milwaukee*, 406 U.S. at 107 (noting that Congress could preempt federal common law governing interstate pollution); cf. *United States* v. *Oregon*, 366 U.S. 643, 649 (1961) (holding that a federal statute divesting the State's claim of title to personal property through escheat did not transgress the Tenth Amendment).[44] In sum, there is no reason to believe that the Tenth Amendment prevents Congress from imposing directly on States the same kinds of affirmative obligations upon which this Court itself has relied, when it seeks to deal with disputes, such as this one, that inherently pit State against State in a manner that threatens severe disruption of interstate commerce.

b. The Constitutionality of Federal Directives to the States Can Be Supported by the Nature and Intensity of the Federal Interest at Stake.—It scarcely need be said

[43] See *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 953-954 (1982) (suggesting that the Commerce Clause is the source of congressional power to regulate interstate groundwater basins).

[44] In fact, Congress, consistent with the logic of *Arizona* v. *California* and the judicial apportionment cases, has enacted equitable apportionment legislation imposing precisely this kind of affirmative obligation on state officials. See Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, §§ 202(a), 204(d)(1)-(2), 104 Stat. 3294, 3303 (1990).

that the Court's view as to the extent to which the Tenth Amendment restrains congressional power under the Commerce Clause has changed from time to time during recent decades. But at all times—including during the primacy of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976)—the Court consistently has recognized that the nature and strength of the federal interest is relevant to the Tenth Amendment analysis. Thus, statutes that affected the sovereignty of the States in ways that otherwise might have been held unacceptable could be upheld if "the nature of the federal interest advanced [was] such that it justifie[d] state submission." *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288 n.29 (1981); accord *EEOC* v. *Wyoming*, 460 U.S. 226, 242 n.17 (1983); *FERC* v. *Mississippi*, 456 U.S. at 764 n.28; *id.* at 778 n.4, 781 n.8 (O'Connor, J., dissenting); *United Transp. Union* v. *Long Island R.R.*, 455 U.S. 678, 684 n.9 (1982); see *National League of Cities*, 426 U.S. at 853 (justifying the Court's acceptance of the statute at issue in *Fry* v. *United States*, 421 U.S. 542 (1975), as resting in part on the fact that the enactment "was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system"). A similar view was urged by the dissenting opinions in *Garcia*. See 469 U.S. at 562-564 (stating that the "seriousness of the problem addressed by the federal legislation" should be "weighed * * * against the effects of compliance on state sovereignty") (opinion of Powell, J., dissenting); *id.* at 588 ("The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States.") (O'Connor, J., dissenting).

c. The Take-Title Provision Is a Permissible Directive to the States.—In light of the principles discussed above, the take-title provision should be held constitutional. Contrary to petitioners' dramatic portrait of the provision as

imposing procrustean restraints on state policy choices, the provision does not require the State to "enact and enforce a federal regulatory program," *Hodel*, 452 U.S. at 288. In fact, the provision is notable for the wide range of the responses that it permits. First, States can meet the responsibility imposed by the Act through the simple act of executing a contract with a sited compact.[45] See 42 U.S.C. 2021c(a)(1), 2021e(e)(1)(F).[46] This approach imposes only a minimal burden, because the State can require generators within its borders to pay the full

[45] For example, Rhode Island and the District of Columbia have used this approach to provide for disposal of the LLRW generated within their borders through 1992 and have been pursuing the possibility of executing access contracts for later years. See *1990 DOE Report*, note 19, *supra*, at 41-42, 45.

[46] Petitioners New York and Allegany County and several of the amici States assert that the 1985 Act requires unsited States to participate in the development of a disposal facility, either alone or as a compact member. See N.Y. Br. 22, 25; Allegany Br. 4; Amici Curiae Ohio, *et al.* Br. 16. Not so. These assertions ignore that the 1985 Act also affords States the option of entering into appropriate access contracts. See 131 Cong. Rec. 38,424 ("[T]his act provides that a nonsited State or compact region may at any time enter into a voluntary agreement with a State that has a disposal facility, which allows the market to work to some degree. The voluntary agreement provisions, along with the surcharge provisions for the 1992-93 period, do introduce a healthy dose of the marketplace into the current situation.") (remarks of Sen. Evans); see also Cortland Br. 5 (acknowledging availability of disposal contract option).

Every compact that has been approved to date authorizes the negotiation of such contracts with unaffiliated, unsited States. Southwestern Compact, Art. III(g)(19), 102 Stat. 4779; Appalachian Compact, Art. 4(B), 102 Stat. 480; Northwest Interstate Compact, Art. V, 99 Stat. 1863; Central Interstate Compact, Art. IV, cl. m.6, 99 Stat. 1868; Southeast Interstate Compact, Art. 4(E)(9), 99 Stat. 1875; Central Midwest Interstate Compact, Art. III, cl. i(1), 99 Stat. 1884; Midwest Interstate Compact, Art. III, cl. h.1, 99 Stat. 1895; Rocky Mountain Compact, Art. VII(c), 99 Stat. 1907-1908; Northeast Interstate Compact, Art. IV, cl. i.11, 99 Stat. 1915.

costs of disposal under any access contract.[47] Second, States can choose to build the disposal facilities, either for themselves or on behalf of a compact region.[48] Third, States (again, on behalf of themselves or compact regions) can choose to allow private parties to construct facilities, subject to State regulation.[49] Moreover, for States that choose to host disposal facilities, technical decisions involving facility design and disposal methods are left to the State's discretion, within broad limits defined by NRC regulations.[50]

[47] Both Rhode Island and the District of Columbia have enacted legislation requiring their generators to pay the full cost of disposal under any access agreement. See D.C. Code Ann. § 6-3704(b) (1989 & Supp. 1991); R.I. Gen. Laws § 23-19.11-1 (1989).

[48] See, e.g., *1990 DOE Report*, note 19, *supra*, at 28-29 (describing Maine's creation of a state agency to site, license, construct, and operate a state-owned facility).

[49] For example, private contractors have been hired to develop and operate disposal facilities in the Southwestern, Central Interstate, Central Midwest, and Appalachian States compacts. See *1990 DOE Report*, note 19, *supra*, at 4-12, 25-26; U.S. General Accounting Office, *Nuclear Waste: Extensive Process to Site Low-Level Waste Disposal Facility in Nebraska* 3-5 (1991).

[50] Surprisingly, petitioner Cortland County complains that the NRC's relatively unconstrained approach has handicapped the States by leaving New York to pursue its preference for alternative disposal methods in a "regulatory vacuum." Cortland Br. 5 & n.6, 11 & nn.8-9. This assertion—which effectively calls for more restrictive federal regulation—is conspicuously absent from New York's own submission. It is true that near-surface disposal is the only disposal technology for which specific technical requirements have been published as a regulation, see 10 C.F.R. 61.50-61.59, but there is no prohibition on the use of other technologies, such as mined cavities, which can be licensed under the general provisions of 10 C.F.R. Pt. 61. Indeed, Congress has sought to encourage alternative approaches. See 42 U.S.C. 2021h (requirement that NRC publish technical guidance on alternatives to shallow land burial); J.A. 92a (affidavit describing guidance); *1990 DOE Report*, note 19, *supra*, at C-1 to C-9 (describing array of DOE technical assistance proj-

Finally, States can determine for themselves the role that their officials will play in licensing and regulating any disposal facilities that they permit within their borders; at their option, they may defer to the NRC or undertake these regulatory functions themselves under authority conferred by the NRC's "agreement-states" program.[51]

Putting the States to a choice among this array of options does not constitute the kind of impermissible commandeering about which the Court expressed concern in *Hodel* and *FERC*. The reason is that the State is not required to enact or enforce a federal regulatory program. Rather, the options outlined above allow the State to comply with the Act without enacting a federally pre-

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ects, including specific assistance to New York through completion of DOE's *Drift Mined Cavity Report*). NRC also has published guidance on below-ground vault and earth-mounded concrete-bunker alternatives. See NRC NUREG 1199, 1200 (Jan. 1988).

[51] Federal-state cooperation in the regulation of nuclear materials was instituted by the 1959 amendments to the Atomic Energy Act. See 42 U.S.C. 2021(b) and (d). These provisions authorize the withdrawal of federal regulatory authority over certain nuclear materials in favor of regulatory programs run by qualified States. See 42 U.S.C. 2021(b). In general, this provision allows qualifying States to regulate all non-federal users of low-level radioactive materials except nuclear reactors and fabricators of fuel. New York was one of the first States to assume regulatory authority under this program. See 27 Fed. Reg. 10,419 (1962); C.A. App. 185-186 (1959 "Atomic Development Plan" for New York State, describing early steps in New York's effort to become an agreement State as part of campaign to promote "the growth of a substantial atomic industry within the state").

The NRC's agreement-states program, together with the reservation to the States in 42 U.S.C. 2021(k) of authority to "regulate activities for purposes other than protection against radiation hazards," see *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205-216 (1983), rebuts Cortland's allegation (Cortland Br. 5) that States have been deprived of "any meaningful authority over the production and environmental control" of LLRW; see Amicus Curiae Connecticut Br. 6 (complaining that the federal government has "displaced the States from regulating").

scribed program. The first option—execution of a contract—can be effected without any significant regulatory activity whatsoever. The second option, construction of a state-owned facility—although it would require a significant commitment of state resources—is qualitatively different from the implementation of federal policies regulating private activity, which would transform state administrative bodies into "field offices of the national bureaucracy." *FERC* v. *Mississippi*, 456 U.S. at 777. Thus, the actions required to exercise this option are not at the core of the concerns identified in *Hodel* and *FERC*. Rather, they resemble much more closely the types of actions Congress and this Court repeatedly have required of States to resolve interstate disputes in the natural resources area. At bottom, Congress has done nothing more here than prohibit New York from allowing its nuclear waste to flow into interstate commerce against the wishes of recipient States; in our view, there is no constitutionally disositive difference between that restriction and a restriction requiring a State to refrain from polluting an interstate stream.

To be sure, the significant commitment of state resources required to comply with this option could raise serious concerns if Congress *required* the States to pursue this course. But the existence of other less burdensome options in this comprehensive program significantly mitigates the burden. Moreover, when the modest level of this intrusion is considered in light of the admittedly grave need for a national resolution to this problem, and the special circumstances that led Congress to choose the course it did, we believe the take-title provision withstands constitutional scrutiny. In the demanding circumstances that form the backdrop for this carefully crafted legislation, only a "curious type of federalism," see *FERC*, 456 U.S. at 766, would hold that Congress was barred from imposing conditions that effectively required the States to take *some* response to the problem, and that Congress instead should have entirely preempted

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the States' authority. In any event, due respect for state sovereignty required by the Constitution should not prevent Congress from requiring the States to live up to the bargain Congress enacted in 1985 (a bargain under which New York already has received more than six years of continued access to the sited States' disposal facilities).

At the same time, we recognize the seriousness of petitioners' concerns[52] that the federal government could seek to evade political accountability for unpopular federal policies through this type of enactment. Those concerns, however, are unfounded here, where the delegation of responsibility to the States was made out of deference to the expressed wishes of the States themselves.[53] There is no constitutional failing in Congress's inability to devise a method by which States could resolve this problem without being held accountable by their citizens. To the contrary, as the court of appeals recognized, the 1985 Act "promot[es] state and federal comity in a fashion rarely seen in national politics," Pet. App. 13a, and reflects a carefully balanced attempt to advance simultaneously the values of governmental responsiveness, democratic participation, and innovation that underlie the constitutional structure of dual sovereignty. See *Gregory* v. *Ashcroft*, 111 S. Ct. at 2399.

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[52] See Cortland Br. 22-23; see also Amicus Curiae Council of State Governments Br. 21-23; Amici Curiae Ohio, *et al.* Br. 14 n.11 (alleging federal interest in placing risk of program failure on States).

[53] Any allegation that Congress sought to avoid federal responsibility also is undermined by the 1985 Act's mandate that the federal government provides for disposal of all greater than Class C wastes, see Section 2021c(b)(1)(D), and establishment of an extensive program of DOE assistance to States involved in siting and developing LLRW disposal facilities, see note 50, *supra*.

2. *The Take-Title Provision Does Not Violate the Guaranty Clause*

Petitioner Allegany County and a number of the amici curiae States contend that the 1985 Act violates the Constitution's provision that the United States shall guarantee to each State a republican form of government, U.S. Const. Art. IV, § 4. Allegany Br. 15; Br. for Amici Curiae Ohio, *et al.* 14-15; Br. for Amicus Curiae Michigan 24-49. To the extent that their submissions adduce the Guaranty Clause as part of the source material for the constitutional principles of federalism discussed above, their argument requires no independent response, as the court of appeals correctly observed. Pet. App. 17a. On the other hand, to the extent that Allegany seeks to identify discrete constitutional limitations on congressional power that are not reflected in the Tenth Amendment cases, its argument is foreclosed. This Court repeatedly has held that separate claims based on the Guaranty Clause are nonjusticiable, whether raised against the States[54] or against the federal government.[55] Moreover, even if Guaranty Clause claims were otherwise justiciable, it is doubtful that the particular claim at issue here could be presented against the United States by a political subdivision of New York where, as in this case, New York itself has declined to press the claim on behalf of its

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[54] See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 223-224 (1962); *Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U.S. 118, 141-151 (1912) (rejecting attack on referendum provision of Oregon Constitution as anti-republican); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 42 (1849) ("it rests with Congress to decide what government is the established one in a State * * * as well as its republican character").

[55] *E.g.*, *Baker* v. *Carr*, 369 U.S. at 224-226; *City of Rome* v. *United States*, 446 U.S. 156, 182 n.17 (1980) (rejecting as nonjusticiable contention that preclearance requirement of the Voting Rights Act violates the Guaranty Clause); *Georgia* v. *Stanton*, 73 U.S. (6 Wall.) 50, 76 (1868) (challenge to Military Reconstruction Act concerns "political rights, which do not belong to the jurisdiction of a court").

citizens. See *New Jersey* v. *City of New York*, 345 U.S. 369, 372-373 (1953) ("[T]he state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens. * * * Otherwise, a state may be judicially impeached on matters of policy by its own subjects."); cf. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923).

III. THE TAKE-TITLE PROVISION IS SEVERABLE FROM THE REMAINDER OF THE 1985 ACT

If, notwithstanding the foregoing, this Court determines that the take-title provision violates constitutional protections of state sovereignty, it should sever the take-title provision from the remainder of the 1985 Act. That provision is entirely independent from the Act's other incentives for States to provide for disposal of LLRW generated within their borders, and from the various other provisions of the Act that impose no discernible burdens on the State at all. See notes 20, 53, *supra*. A State may ignore the pre-1996 interim deadlines entirely and still avoid the burden of the take-title provision by meeting the 1996 deadline. Alternatively, it may meet all of the milestones and still fail to provide for disposal by the final deadline. Because there is no indication that Congress intended for these provisions to apply only in conjunction with the take-title requirement, the constitutionality of these provisions should be assessed independently.

"Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of intent." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); see *id.* at 692 (opinion of Powell, J.). "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932) (*quoted in Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987)). As this Court has explained, this rule applies even in the absence of a severability clause, because "Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 685. Accordingly, if the constitutionally unobjectionable part of a statute can function independently in the manner anticipated by Congress, then "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Ibid.*

Although Congress (and particularly the Senate), viewed the take-title provision as an important incentive device, there is no indication that majority support for the Act hinged on its inclusion. The bill that the House enacted by unanimous roll-call vote on Deecember 9, 1985, contained all of the principal components of a legislative proposal that had been agreed to by the sited States and unsited States earlier in the year.[56] Neither the proposal nor the House bill included a take-title provision. The Senate amendments to that bill, which strengthened the Act's incentives by adding the take-title provision and a fourth milestone (the January 1, 1992, deadline for completed license applications), embodied a compromise between approaches developed by two Senate Committees. To be sure, supporters of the compromise in both chambers of Congress, striving on the last day of the session to complete legislation that would avert the threatened shutdown of existing disposal facilities, emphasized the del-

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[56] See 131 Cong. Rec. 35,197 (1985); *Waste Hearing*, note 12, *supra*, at 155 (testimony of South Carolina Gov. Riley); *id.* at 191 (outline of compromise package). Although the House bill softened the milestone incentives in this package by substituting penalty surcharges for denials of access in certain circumstances, the sited States were willing to accept this modification. See *Disposal Hearing*, note 13, *supra*, at 253.

icacy of the inter-Committee compromise.[57] But these comments do not demonstrate that the viability of the Act turned on this provision.[58] To the contrary, in brief discussion of the constitutionality of the take-title provision, it was presumed, without eliciting any challenge or contradiction, that the provision was severable.[59]

Moreover, New York's argument that the take-title provision is not severable fails to consider the implications of wholesale invalidation of the 1985 Act. Because Congress's consent to all of the compacts has been "granted subject to the provisions of the Low-Level Radio-

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[57] See 131 Cong. Rec. 38,414-38,416 (1985) (descriptions of negotiations between Senate Committees) (remarks of Sens. Johnston and McClure); *id.* at 38,115 ("[T]he Senate has been involved in internal negotiations * * * for a number of weeks. The bill they sent to us today is a tenuous settlement which we understand is acceptable both to States with low-level waste disposal capacity, and to those States needing disposal capacity until new sites can be developed.") (remarks of Rep. Udall); *id.* at 38,115 ("The amendments now under consideration are the result of a delicately crafted compromise which enjoys almost universal support.") (remarks of Rep. Bonker); *id.* at 38,116 ("I support the action today as a reasonable compromise on the low-level waste issue.") (remarks of Rep. Markey); *id.* at 38,118 ("[T]he bill we act on today is a fundamental compromise worked out by the two committees, that would be the subcommittees in the House, and also by our good friends in the Senate.") (remarks of Rep. Dingell).

[58] The efficacy of the 1985 Act even apart from the take-title provision is apparent from the legislative history and text of the legislation that New York enacted in 1986 in response to the Act. As the discussion above makes clear, see pages 16-17, *supra*, state agencies and the legislature itself justified the State's enactment by reference to the costs to the State of a loss of access for New York LLRW generators, making no mention of the take-title requirement.

[59] Representative Markey commented: "Because the provision comes in only in 1996 or 1993, it is intended that the provision be severable from the rest of the act, should it be found unconstitutional." 131 Cong. Rec. 38,117 (1985).

active Waste Policy Act," as amended,[60] the logic of New York's position—calling for invalidation of the entire package of amendments to the LLRW Policy Act—would lead to the invalidation of all of the compacts, whether approved in the second title of the 1985 Act or in subsequent legislation.[61] Thus, the compacts would be unable to exercise any legal authority for which congressional approval was required under the Commerce Clause, including, at a minimum, any authority to discriminate against interstate waste on the basis of its geographic origin. The consequences of wholesale invalidation for the compact system that Congress, at the States' behest, has been seeking to encourage since 1980 provide further evidence that Congress did not intend for the entire Act to stand or fall with the take-title provision. The serious ramifications of the crisis before Congress in 1985 make it clear that, whatever Congress would have done if it had known that the take-title provision was impermissible, it plainly would have done something. In these circumstances, it cannot fairly be said to be "evident that the Legislature would not have enacted those provisions

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[60] See Southwestern Compact Consent Act, § 3(2), 102 Stat. 4773; Appalachian Compact Consent Act, § 3(2), 102 Stat. 471; Omnibus Compact Act, § 212(2), 99 Stat. 1860.

[61] Each of the existing compacts contains a severability provision through which member States agree to abide by the remaining provisions of their agreements in the event of partial invalidation. See Southwestern Compact, Art. VIII, 102 Stat. 4782; Appalachian Compact, Art. 5, 102 Stat. 481; Northwest Interstate Compact, Art. VII, 99 Stat. 1863; Central Interstate Compact, Art. IX, 99 Stat. 1871; Southeast Interstate Compact, Art. 9, 99 Stat. 1880; Central Midwest Interstate Compact, Art. X, 99 Stat. 1892; Midwest Interstate Compact, Art. X, 99 Stat. 1902; Rocky Mountain Compact, Art. IX, 99 Stat. 1909; Northeast Interstate Compact, Art. X, 99 Stat. 1924. None of these provisions, however, indicates that the compact is intended to continue functioning—to the extent permitted by the Compact and Commerce Clauses—following a revocation of congressional approval.

which are within its power," *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. at 684 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976)). Accordingly, if, contrary to our submission, this Court concludes that the take-title provision is unconstitutional, it should hold the take-title provision severable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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